NO. 20-01399

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RONNIE FISCHER, an Individual

Appellant

v.

BMW OF NORTH AMERICA, LLC, a Delaware Company

Appellee

On Appeal from the United States District Court for the District of Colorado

Chief Judge Philip Brimmer

Case No. 18-cv-00120-PAB-MEH

BRIEF OF *AMICUS CURIAE* LAWYERS FOR CIVIL JUSTICE IN SUPPORT OF DEFENDANT/APPELLEE BMW OF NORTH AMERICA, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF INTEREST

Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, defense trial lawyer organizations, and law firms that promotes excellence and fairness in the civil justice system. For over 30 years, LCJ has been advocating for procedural rule reforms that (1) promote balance in the civil justice system; (2) reduce the costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. One of these reforms involves Federal Rule of Evidence 702.

LCJ has specific expertise on the meaning, history, and application of Rule 702. LCJ has submitted extensive comments including original research to the Judicial Conference Advisory Committee on Rules of Evidence,[1] which last week voted to recommend publication of an amendment to Rule 702 that will clarify courts' "gatekeeping" responsibilities when determining the admissibility of expert testimony.[2]

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[1] *E.g.*, Lawyers for Civil Justice, *Why Loudermill Speaks Louder than the Rule: A "DNA" Analysis of Rule 702 Case Law Shows that Courts Continue to Rely on Pre-Daubert Standards Without Understanding that the 2000 Amendment Changed the Law*, Comment to the Advisory Committee of Rules of Evidence and Rule 702 Subcommittee (Oct. 20, 2020); https://20-ev-y_suggestion_from_lawyers_for_civil_justice_-_rule_702_0.pdf (uscourts.gov).

[2] *See* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendment to Rule 702* (Apr. 1, 2021) at 16 – 20, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 90 (2021), https://www.uscourts.gov/sites/default/files/ advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf (presenting text of proposed Rule 702 amendment and draft Committee Note).

LCJ's analysis reveals widespread misunderstanding of Rule 702's requirements. Many courts—including courts within the Tenth Circuit—fail to recognize that the sufficiency of an expert's factual basis is an admissibility consideration under Rule 702(b) and fail to apply the Federal Rule of Evidence 104(a) burden of production to expert admissibility decisions. Instead, courts frequently rely (whether knowingly or not) on caselaw that was rejected by the 2000 amendment to Rule 702. LCJ supports the Standing Committee's adoption of an amendment to Rule 702 that would promote uniform and predictable application of existing standards.

This brief will assist the Court in addressing the issues presented because Plaintiff is urging this Court to rely on common misconceptions of the Rule 702 standards to overturn the district court's proper exclusion of the proffered expert testimony. Accordingly, LCJ has simultaneously filed a motion for leave to file this brief along with its proposed amicus brief in support of Defendant/Appellee BMW of North America, Inc.

ARGUMENT

Courts in the Tenth Circuit have struggled in their handling of opinion testimony, and this case shows the compelling need for direction from this Court to stop the problematic practices. Some district courts have been led astray by pre-Rule 702 caselaw statements that describe a restricted gatekeeping function not consistent with the rule's mandates. Drawing upon superseded caselaw, decisions in this circuit have announced that, "as a general rule, the factual basis of an expert

opinion goes to the credibility of the testimony rather than the admissibility," and so is an issue for the jury and not the court to decide.[3] Equally troubling are cases asserting that courts may determine expert admissibility using a burden of production less stringent than the preponderance of evidence test, finding a "presumption" of admissibility or employing an exceedingly low hurdle.[4]

Plaintiff urges this Court to apply these incorrect approaches to the gatekeeping function, but the district court's ruling in this case should be upheld. Federal Rule of Evidence 702 – the rule itself – sets the standard for admissible expert testimony, and the district court properly followed the directives of Rule 702. In concluding that Dr. Aaron Lalley could not testify, the district court employed the elements of Rule 702 as admissibility requirements and held Plaintiff to the applicable burden of production.

Plaintiff argues for an approach to judicial gatekeeping that ignores Rule 702's direction that courts must determine as a matter of admissibility whether opinion testimony rests on a sufficient factual basis. Plaintiff also wrongly contends that courts should rely on cross-examination rather than judicial

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[3] *Finn v. BNSF Ry. Co*., No. 11-CV-349-J, 2013 WL 462057, at *3 (D. Wyo. Feb. 6, 2013); *NetQuote Inc. v. Byrd*, No. 07-cv-00630-DME-MEH, 2008 WL 2442048, at *9 (D. Colo. Apr. 29, 2008).

[4] *Price v. General Motors, LLC*, No. CIV-17-156-R, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018). *See also Beebe v. Colorado*, No. 18-cv-01357-CMA-KMT, 2019 WL 6044742, at *6 (D. Colo. Nov. 15, 2019).

gatekeeping to regulate dubious opinion evidence, overlooking the burden of production that Rule 702 places on the sponsor of an expert witness. The fact that decisions within the Tenth Circuit follow archaic caselaw statements to misapply the admissibility criteria or employ the wrong burden of production, as Plaintiff urges here, demonstrates that some courts fundamentally misunderstand how to perform their gatekeeping function. They need direction.

This case presents a timely opportunity for the Court to provide the guidance needed by bench and bar in advance of the potential amendment to Rule 702.

THE TENTH CIRCUIT NEEDS TO CLARIFY THAT FEDERAL RULE OF EVIDENCE 702 GOVERNS THE ADMISSIBILITY OF EXPERT TESTIMONY.

Rule 702, and not any other source of law, provides the standard that district courts must use to assess whether a proffered expert's opinions are admissible.[5] The Chair of the Advisory Committee's Rule 702 Subcommittee recently chided courts that do not center their gatekeeping analysis on Rule 702:

> a surprising number of cases start and end with *Daubert*[6] and its progeny and fail to mention Rule 702. Of course, Rule 702 was amended in 2000, and the elements of Rule

[5] *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316-17 (2016) (addressing admissibility of expert testimony using Rule 702).

[6] *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993).

> 702, not the caselaw, are the starting point for the requirements for admissibility.[7]

In its subparts (a) through (d), Rule 702 "provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." Advisory Committee Note to the 2000 Amendments to Rule 702 (emphasis added).

A. Rule 702(b) Requires Courts to Determine the Sufficiency of an Expert's Factual Basis as a Matter of Admissibility.

Rule 702(b) mandates that proffered opinions must be "based on sufficient facts or data[.]" The court must decide the adequacy of an expert's factual foundation as a matter of admissibility:

> In sum, the 2000 amendment [to Rule 702] specifies that sufficient basis and application of method are admissibility requirements – the judge must be satisfied by a preponderance of the evidence that the expert has relied on sufficient facts or data, and that the expert has reliably applied the methods.[8]

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[7] Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2060 (2020). *See also Kansas City S. Ry. Co. v. Sny Island Levee Drainage Dist.*, 831 F.3d 892, 900 (7th Cir. 2016) (stating that the litigants "should have paid more attention to Federal Rule of Evidence 702, which superseded *Daubert* many years ago"); *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005) (recognizing that, "[a]t this point, Rule 702 has superseded *Daubert*").

[8] Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Forensic Evidence, Daubert and Rule 702* (Apr. 1, 2018) at 43, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2018 AGENDA BOOK 49 (2018),

Therefore, unless the court concludes by a preponderance of proof that the opinions have sufficient factual support, the expert's testimony is properly excluded.[9]

Some litigants, and unfortunately some courts, misunderstand the Rule 702(b) standard. They assert that whether an expert's opinions have an adequate factual basis conceptually presents an issue of weight for the jury to decide, rather than a question of admissibility that the judge must determine. Such statements are wrong on the law:

> It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 [, including that it is based on sufficient facts or data,] are met by a preponderance of the evidence. . . . It is not

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https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-april-2018 (emphasis added).

[9] *See* Advisory Committee Note to the 2000 Amendments to Rule 702 ("The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted.") (emphasis added). *See also* Memorandum from Daniel J. Capra, Reporter, Advisory Comm. on Evidence Rules, to Advisory Comm. on Evidence Rules, *Possible Amendments to Rule 702* (Apr. 1, 2019) at 23, *in* ADVISORY COMMITTEE ON EVIDENCE RULES MAY 2019 AGENDA BOOK 95 (2019), https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-evidence-may-2019 ("The Rule provides that the requirements of sufficient basis and reliable application must be treated as questions of admissibility, and so must be established by a preponderance of the evidence under Rule 104(a).") (emphasis added).

> appropriate for these determinations to be punted to the jury, but judges often do so.[10]

Despite misstating the law, such assertions appear in briefs and even rulings with unsettling frequency. As the Reporter to the Advisory Committee on Evidence Rules recently lamented:

> Many opinions can be found with broad statements such as "challenges to the sufficiency of an expert's basis raise questions of weight and not admissibility" – a misstatement made by circuit courts and district courts in a disturbing number of cases.[11]

The misguided view that an expert's factual basis involves only the weight of the opinion testimony has become such a problem that the Advisory Committee on Evidence Rules at its April 30, 2021 conference voted to recommend a proposed amendment to Rule 702 that "would clarify that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of

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[10] *See*, *e.g.*, Minutes - Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules (Jan. 5, 2021) at 25, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 36 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf (emphasis added). *See also* Schroeder, 95 NOTRE DAME L. REV. at 2039 ("some trial and appellate courts misstate and muddle the admissibility standard, suggesting that questions of the sufficiency of the expert's basis and the reliability of the application of the expert's method raise questions of weight that should be resolved by a jury, where they can be subject to cross-examination and competing evidence.") (emphasis original).

[11] Apr. 1, 2021 Memorandum from Daniel J. Capra, Reporter, *supra* n.2, at 11.

the prerequisites are met."[12] The Standing Committee on Practice and Procedure in June will decide whether the proposed amendment will be published for public comment. The Standing Committee's Chair, Judge John D. Bates, has indicated he "anticipate[s] no resistance from the Standing Committee to such a proposal."[13]

This Court should take this opportunity to articulate clearly this standard as the law of this Circuit, because many district courts within the Tenth Circuit have applied the erroneous perspective that the factual basis underlying opinion testimony is a matter of credibility, and not an admissibility decision for the court under Rule 702. The Court should stop the propagation of these misconceptions

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[12] Minutes - Committee on Rules of Practice & Procedure, Report of the Advisory Committee on Evidence Rules, *supra* n.10, at 25. The Draft Committee Note that accompanies this proposed amendment explicitly rejects those cases that describe an expert's factual foundation as an issue of weight and not admissibility:

> But unfortunately many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a)[.]

Draft Committee Note to Proposed Amendment to Rule 702 (emphasis added), included in Capra, *supra* n.2, at 16.

[13] Minutes - Advisory Committee on Evidence Rules (Nov. 13, 2020) at 6, *in* ADVISORY COMMITTEE ON EVIDENCE RULES APRIL 2021 AGENDA BOOK 15 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_agenda_book_spring_2021_0.pdf

and make clear that the analysis required under Rule 702 obligates district courts to examine the factual basis as a matter of admissibility – not weight.

1. Some Courts in the Tenth Circuit, as Well as Plaintiff, Wrongly View an Expert's Factual Basis as an Issue of Weight and Not Admissibility

Certain district courts in the Tenth Circuit misunderstand or have disregarded the directive of Rule 702(b) that judges must determine, as a matter of admissibility, if a sufficient factual basis supports proffered opinion testimony. Contrary to Rule 702, some courts have declared that, "as a general rule, the factual basis of an expert opinion goes to the credibility of the testimony rather than the admissibility[.]" *E.g.*, *Finn v. BNSF Ry. Co*., No. 11-CV-349-J, 2013 WL 462057, at *3 (D. Wyo. Feb. 6, 2013); *NetQuote Inc. v. Byrd*, No. 07-cv-00630-DME-MEH, 2008 WL 2442048, at *9 (D. Colo. Apr. 29, 2008).[14] These courts typically identify *Werth v. Makita Elec. Works, Ltd*., 950 F.2d 643, 654 (10th Cir.

[14] The quoted language, slightly paraphrased, originated in a pre-Rule 702 Eighth Circuit opinion, *Loudermill v. Dow Chem. Co*., 863 F.2d 566, 570 (8th Cir. 1988) ("As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility[.]"). Courts within the Tenth Circuit occasionally will cite Eighth Circuit decisions that recycle this statement when mistakenly asserting that the sufficiency of an expert's factual basis is not an issue for the court to determine. *See*, *e.g.*, *Chavez v. Marten Transp., Ltd*., Civ. No. 10-0004 MV/RLP, 2013 WL 5948911, at *3 (D.N.M. May 2, 2013) (quoting *Loudermill* statement as repeated in *Hose v. Chicago Nw. Transp. Co*., 70 F.3d 968, 970 (8th Cir. 1996)); *First Data Corp. v. Konya*, No. 04-CV-00856-JLK-CBS, 2007 WL 2116378, at *12 (D. Colo. July 20, 2007) (quoting *Loudermill* statement reiterated in *Bonner v. ISP Tech., Inc*., 259 F.3d 924, 929 (8th Cir. 2001)).

1991) as their authority for finding that an expert's factual foundation is not a judicial gatekeeping consideration. *See Finn*, 2013 WL 462057, at *3; *NetQuote*, 2008 WL 2442048, at *9.[15] Certain other courts within the Tenth Circuit have relied on *Compton v. Subaru of Amer., Inc*.[16] to declare that objections to an expert's reliance on incomplete and inadequate facts "center more on the weight to be given to [the experts'] testimony, rather than its admissibility." *Yetter v. Farmers Ins. Co*., No. CIV-14-110-C, 2015 WL 13567436, at *1 (W.D. Okla. Feb. 9, 2015). *See also Phillip M. Adams & Asso., LLC v. Winbond Elec. Corp.*, No. 1:05-CV-64 TS, 2010 WL 3700189, at *2 & n.13 (D. Utah Sept. 14, 2010) (citing *Compton* in rejecting challenge to basis for expert opinions on "the mental processes and motives of others," finding "these objections go to the weight, not the admissibility of the evidence.").

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[15] *See also Arkansas River Power Auth. v. Babcock & Wilcox Power Co*., No. 14-cv-00638-CMA-NJW, 2016 WL 9734684, at *5 (D. Colo. Oct. 24, 2016) ("The Tenth Circuit, however, has explained that 'the sufficiency of factual basis to support [the expert's] opinion goes to its weight, and not its admissibility.'") (quoting *Werth v. Makita Elec. Works, Ltd*., 950 F.2d 643, 654 (10th Cir. 1991)); *Rivera v. Volvo Cars of N. Amer., LLC*, No. 13-00397-KG/KBM, 2015 WL 11118065, at *5 (D.N.M. May 28, 2015) ("Defendant's challenge to Hoffman's failure to review scientific literature goes to the weight that the jury may afford her testimony and not its admissibility.") (citing *Werth*, 950 F.2d at 654).

[16] *Compton v. Subaru of Amer., Inc.*, 82 F.3d 1513, 1518 (10th Cir. 1996), *abrogated by Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) ("'as long as a logical basis exists for an expert's opinion . . . the weaknesses in the underpinnings of the opinion[ ] go to the weight and not the admissibility of the testimony.'") (quoting *Jones v. Otis Elevator Co*., 861 F.2d 655, 663 (11th Cir. 1988)).

Plaintiff urges this Court to follow *Compton*, arguing that inaccuracies in vehicle weight used in Dr. Lalley's calculation "g[o] to the weight and not admissibility of the expert opinion, and is a question for cross-examination." Plaintiff's Opening Brief at 10, n.2. His argument simply fails to recognize that Rule 702 itself, not pre-existing caselaw, establishes the standard courts must apply.

2. Courts and Litigants Need Direction that They Should Not Follow Cases that Diverge from Rule 702.

The Court should reject Plaintiff's view that judges have a sideline role in evaluating the adequacy of an expert's factual foundation. In light of the problematic citations that appear in some rulings, the Court should expressly declare that *Compton* and *Werth* are not good law. Those cases, decided before the adoption of Rule 702, incorrectly restrict the gatekeeping function and distract too many courts and counsel.

Critically, *Compton* and *Werth* do not reflect the applicable law. The text of Rule 702 itself sets the expert admissibility standard courts must follow, and Rule 702(b) states that whether opinion testimony has a sufficient factual basis is an admissibility question that the court must determine.[17] The fact that *Compton* and *Werth* take positions irreconcilable with Rule 702 is not surprising when their

[17] *See* n.8 & n.9, *supra*.

historical context is considered: both cases were decided years before the present Rule 702 became effective in 2000. Rule 702 was subsequently enacted with the knowledge and recognition that it established a standard stricter than some courts applied at that time.[18] The adoption of amended Rule 702 displaced conflicting caselaw articulations of the expert admissibility standard.[19] Recycled pre-Rule 702 caselaw statements, such as those set forth in *Compton* and *Werth*, accordingly do not reflect the current standard and should not be referenced.[20]

Further, Plaintiff's *Compton*-informed conception of the standard inverts the analysis of an expert's factual basis under Rule 702. Plaintiff would have courts start the assessment by considering the question addressed by the objection and

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[18] *See* Hon. Fern M. Smith, Report of the Advisory Committee on Evidence Rules (May 1, 1999) at 7, *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 1999 AGENDA BOOK 52 (1999), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-1999 ("The proposed amendment and the Committee Note clearly envision a more rigorous and structured approach than some courts are currently employing.").

[19] *See* n.7, *supra*.

[20] *See* Schroeder, 95 NOTRE DAME L. REV. at 2060:

> In the vast majority of cases under question, while Rule 702 and relevant cases are cited, there is no acknowledgement that the gatekeeper function requires application of Rule 104(a)'s preponderance test, much less for each of the elements of the Rule. Instead, courts tend to defer to statements from caselaw, even if it is outdated. (emphasis original)

deciding if it "goes to the weight and not admissibility of the expert opinion[.]"[21] Rule 702, however, compels courts to look first to the question of foundational sufficiency and determine at the outset if the opinion testimony has adequate factual support:

> It is not the case that the judge can say "I see the problems, but they go to the weight of the evidence." After a preponderance is found, then any slight defect in either of these factors becomes a question of weight. But not before.[22]

The proper consideration for the court is whether the proponent has demonstrated an appropriate factual foundation for the opinions, not the nature of the objection.[23] The approach suggested in *Compton* and *Werth*, and embraced by Plaintiff, misapprehends the operation of Rule 702.

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[21] Plaintiff's Opening Brief at 10, n.2. Some court decisions also seemingly begin the analysis by characterizing the opponent's challenge to the factual support and proceed no farther if the objection is deemed to be only a "weight" challenge. *See*, *e.g.*, *Arkansas River Power Auth.*, 2016 WL 9734684, at *5; *Chavez*, 2013 WL 5948911, at *2 - *3.

[22] Apr. 1, 2018 Memorandum from Daniel J. Capra, Reporter, *supra* n.8, at 43 (emphasis original).

[23] *See* Schroeder, 95 NOTRE DAME L. REV. at 2061 (a challenge to an opinion's basis "does not automatically render the question one for a jury, as some of the cases suggest. Rather, the trial judge, as gatekeeper, must determine whether such challenges are so significant that the factual basis for the opinion fails to reach the preponderance standard, or instead, whether the alleged defects are sufficiently minor, such that they do not undermine the remaining basis.").

The district court in this case, however, properly avoided the *Compton* and *Werth* trap that ensnares too many judges. Rather than brush aside the objections to Dr. Lalley's factual basis as a credibility and not an admissibility issue, the district court considered whether Plaintiff had demonstrated by a preponderance of evidence that Dr. Lalley's opinion was supported by sufficient facts and data. The district court observed that Dr. Lalley's jack-stability opinion hinged on a formula, but Dr. Lalley failed to provide a source establishing the validity of the specific values he input into that formula.[24] Similarly, the district court correctly assessed the factual foundation of Dr. Lalley's pinch-point theory as a matter of admissibility and determined that Plaintiff failed to meet his burden of production under Rule 702(b).[25]

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[24] March 10, 2020 Order at 6 (noting Dr. Lalley gave no indication of the source or accuracy of the BMW vehicle weight and "other provided figures" used in the stability calculation and recognizing that "[Dr. Lalley] cites no independent information that his formula . . . has any reliable scientific basis as applied to jacks of this type.") (emphasis added).

[25] *Id*. at 10:

> There is no content in Dr. Lalley's reports that serves as a basis for his opinion that the BMW lug wrench is less safe than alternatives because it contains a parallel handle that could create a pinch point if forced to the ground…The Court finds that, based on Dr. Lalley's expert report, his conclusion regarding the design defect of the lug wrench can only be considered *ipse dixit*.

This district court therefore properly applied Rule 702. The Court should respond to Plaintiff's ill-conceived criticism of the ruling by clarifying for litigants and other courts within the Tenth Circuit that, contrary to the statements in *Compton*, *Werth*, and their progeny, the sufficiency of an expert's factual basis is an admissibility assessment that courts must make. Judge Schroeder recently explained the need for this guidance:

> No doubt, in some cases the courts are misstating and misapplying Rule 702. Correction by the courts of appeals will go a long way to remedying the most obvious outliers.[26]

LCJ submits that litigants and courts would benefit if the Court, in its ruling on this case, warned district courts against reliance on pre-Rule 702 caselaw statements and instructed them to apply the admissibility standard set forth in Rule 702 itself.

B. Rule 702's Criteria Must Be Met by a Preponderance of the Evidence.

Courts must view the Rule 702 admissibility requirements through the lens of the Rule 104(a) burden of production. The Advisory Committee Note to the 2000 Amendment to Rule 702 instructs:

> the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a

[26] Schroeder, 95 NOTRE DAME L. REV. at 2059.

> preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

Despite this direction, the Advisory Committee now finds that "many courts are ignoring that standard."[27] Unfortunately, some courts in the Tenth Circuit are among those applying a test that does not comport with Rule 104(a).

A number of recent district court decisions in this circuit have examined opinion testimony using a deferential approach that assumes admissibility. Rather than hold the proponent to meeting the burden of production, some courts have declared there is a "presumption under the Rules that expert testimony is admissible." *E.g.*, *Price v. General Motors, LLC*, No. CIV-17-156-R, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018) (quotations omitted); *United States v. McCluskey*, 954 F. Supp. 2d 1224, 1238 (D.N.M. 2013) (quotation omitted). Some other courts describe the admissibility hurdle as minimal, so that "[o]nly if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the [trier of fact] must such testimony be excluded." *Beebe v. Colorado*, No. 18-cv-01357-CMA-KMT, 2019 WL 6044742, at *6 (D. Colo. Nov. 15, 2019) (emphasis original) (quotation omitted). *See also Thompson v. APS of Okla., LLC*,

[27] Hon. Patrick J. Schiltz, Report of the Advisory Committee on Evidence Rules (Dec. 1, 2020) at 5, *in* COMMITTEE ON RULES OF PRACTICE & PROCEDURE JANUARY 2021 AGENDA BOOK 441 (2021), https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf

No. CIV-16-1257-R, 2018 WL 4608505, at *5 n. 15 (W.D. Okla. Sept. 25, 2018); *Finn*, 2013 WL 462057, at *3 (similar statements).[28] These conceptions of the expert admissibility assessment fundamentally misunderstand the burden of production applicable to Rule 702, and they require corrective guidance from this Court.[29]

Plaintiff urges a similarly deferential notion of how courts should evaluate the admissibility of opinion testimony. He draws on the frequently quoted statement from *Daubert* that "vigorous cross-examination" is the "traditional and

[28] *Beebe*, *Thompson* and *Finn* all indicate that the quoted statement is taken from *Bonner v. ISP Tech., Inc*., 259 F.3d 924, 929-30 (8th Cir. 2001). *Bonner*, however, draws that language from *Hose v. Chicago Nw. Transp. Co*., 70 F.3d 968, 974 (8th Cir. 1996), which itself quotes the 1988 *Loudermill* opinion, 863 F.2d at 570. This description of an exceedingly low hurdle that expert testimony must overcome therefore does not interpret or apply the current standard – it pre-dates Rule 702 and even *Daubert*, and constitutes a recycled approach to expert admissibility that courts should have discarded upon the adoption of Rule 702.

[29] *See* Capra, *supra* n.2, at 11, n.4 (declaring that it "is decidedly not the case" that expert testimony can be described as "presumptively admissible"). *See also* Lee Mickus, *Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstandings about Expert Evidence*, WLF Working Paper No. 217 at 17 (May 2020), https://www.wlf.org/wp-content/uploads/2020/05/0520Mickus WPfinal-for-web-002.pdf ("Decisions applying the view that 'exclusion is disfavored' fail to hold the proponent responsible for establishing by a preponderance of the evidence that the expert's analysis meets all the Rule 702 requirements.").

appropriate means of attacking shaky but admissible evidence" to contend that the district court went too far in excluding his expert.[30]

Contrary to Plaintiff's suggestion, cross-examination is not an adequate substitute for judicial gatekeeping. Judge Schroder has warned against attempts to interpret the referenced sentence from *Daubert* as detracting from the proponent's burden of production:

> *Daubert*'s famous line about "shaky but admissible evidence" should not be misused to avoid a proper analysis or, worse, relegate gatekeeper questions to a factfinder. The trial court must first find whether the opinion testimony is admissible.[31]

In fact, Rule 702 was amended in 2000 in order to reflect the Supreme Court's determination in *Daubert* "that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony," and so "the trial judge must act as a gatekeeper to ensure that unreliable opinions don't get to the jury in the first place."[32] When courts fail to apply the preponderance of the evidence test and

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[30] Plaintiff's Opening Brief at 10, n.2 (quoting *Daubert*, 509 U.S. at 596).

[31] Schroeder, 95 NOTRE DAME L. REV. at 2061 (emphasis original).

[32] Minutes of the Meeting of May 3, 2019, Advisory Comm. on Evidence Rules at 23, *in* ADVISORY COMMITTEE ON EVIDENCE RULES OCTOBER 2019 AGENDA BOOK 73 (2019), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-october-2019. *See also* Mickus, *supra* n.29, at 8 ("The key to reconciling these divergent strands of the *Daubert* holding is the recognition that cross-examination simply is not

instead presume admissibility, as Plaintiff suggests, they improperly "relegate to the jury the very decisions that Rule 702 contemplates to be beyond jury consideration."[33]

To address the erroneous court practice of misapplying or overlooking the burden of production applicable to admissibility decisions, seen in cases such as *Price* and *Beebe* and urged by Plaintiff here, the proposed Rule 702 amendment will "explicitly add the preponderance of evidence standard" into the text of the rule.[34] The Draft Committee Note explains that the change is intended "to clarify and emphasize that the admissibility requirements set forth in the Rule must be established to the court by a preponderance of the evidence."[35]

In this case, the Court should take this opportunity to direct district courts that they must assess proffered opinion testimony against the Rule 702 admissibility requirements using the preponderance of evidence test, as the district court did here. The district court in the case at bar properly applied the burden of

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capable of safeguarding the trial process against the misleading influence of unreliable expert testimony.").

[33] Schroeder, 95 NOTRE DAME L. REV. at 2043.

[34] Schiltz, *supra* n.27, at 5. *See also* Minutes - Advisory Committee on Evidence Rules, *supra* n. 13, at 3-4 ("Twenty years later [after adoption of current Rule 702] – when it is clear that federal judges are not uniformly finding and following the preponderance standard – the justification for a clarifying amendment exists.").

[35] Capra, *supra* n.11, at 16.

production and found that Plaintiff "has not met his burden of demonstrating the admissibility" of either Dr. Lalley's pinch point opinion or his jack stability opinion. March 10, 2020 Order at 10, 8. Plaintiff failed to demonstrate by a preponderance of the evidence that these opinions were supported by sufficient facts or resulted from a reliable methodology. *Id*. Because the district court correctly approached the admissibility determination using the burden of production, the Court should affirm the exclusion of Dr. Lalley's opinions. To address the erroneous statements in district court rulings that a lower burden of production applies, the Court's ruling should explain that diluting the preponderance of evidence standard constitutes a misapplication of Rule 702. Re-characterizing the burden of production using a "presumption of admissibility" as in *Price* or through the *Beebe* "only if fundamentally unsupported" test, or displacing the burden with reliance on cross-examination as Plaintiff urges, misconceive the courts' gatekeeping function and warrant correction from this Court.

CONCLUSION

The Tenth Circuit should affirm the district court and in so doing address erroneous understandings of the Rule 702 standard, including the breadth of its admissibility requirements and the nature of its burden of production. Left uncorrected, these misconceptions will continue to mislead courts and litigants in

future cases, as these "broad misstatements of the law can have a pernicious effect beyond the specific case."[36] This case presents an excellent vehicle to remind courts that reliance on cases such as *Compton* and *Werth* is improper, and statements such as those in *Bonner* and *McCluskey* rejecting the preponderance of evidence test should not be followed.

The district court in this case correctly assessed the proffered opinion testimony using the applicable burden of production and the full set of admissibility criteria. Its approach to the Rule 702 analysis may provide a suitable example to other courts and litigants. The Court should pair affirmation of the district court's unpublished decision to exclude Dr. Lalley's opinions with an explicit description of the applicable standards and assessments that a proper Rule 702 analysis includes.

[36] *Id.* at 11 (emphasis added).

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains **5,147** words, excluding parts of the brief exempted by Fed. R. App. P. 32(f). This number of words is less than one-half the 13,000 words allowed for a principal's brief under Fed. R. App. P. 32(a)(7)(B)(i). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced 14-point Times New Roman font using Microsoft Word.

/s/ Lee Mickus

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2021, I electronically filed the foregoing Amicus Brief with the Clerk of Court using the CM/ECF System, which will send a notification of electronic filing to all counsel of record who are registered CM/ECF users.

/s/ Lee Mickus